SUPREME COURT, U. S.
No. 718
FILED
OCT 12 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

ARTHUR B. SACHS AND M. PRIAL CURRAN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

DON H. REUBEN,
LAWRENCE GUNNELS,
KIRKLAND, ELLIS, HODSON,
CHAFFETZ & MASTERS,
2900 Prudential Plaza,
Chicago, Illinois,
ALAN M. DERSHOWITZ,
Langdell Hall,
Cambridge, Massachusetts,
Attorneys for Petitioners.

Of Counsel:
WILLIAM T. KIRBY,
HUBACHEK, KELLY, MILLER,
RAUCH & KIRBY,
130 East Randolph Drive,
Chicago, Illinois,

THE BLAKELY PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Introductory Statement	1
Opinion Below	2
Jurisdiction	2
Question Presented	2
Constitutional Provisions and Rule Involved	3
Statement of the Case	3
Reasons for Granting the Writ	8
Conclusion	23

CITATIONS.

Cases.

Caminetti v. United States, 242 U. S. 470 ..... 9, 10

Chapman v. California, 386 U. S. 18, 24 19

de Luna v. United States, 308 F. 2d 140, rehearing denied, 324 F. 2d 375 ..... 10, 12, 13, 14

Delli Paoli v. United States, 352 U. S. 232 8

Duratron Corp. v. Republic Stuyvesant Corp., 1 Crim. L. Rptr. 2209 (N. J. App. Div. 1967) 10

Greenwell v. United States, 317 F. 2d 108 18

Griffin v. California, 380 U. S. 609 8

Hansel v. Purnell, 1 F. 2d 266 10

Hayes v. United States, 329 F. 2d 209; 377 U. S. 980 .. 10

Hoffman v. United States, 321 U. S. 479 9

In re Oliver, 333 U. S. 257 18

Kolod v. United States, 371 F. 2d 983 15

Olmstead v. United States, 19 F. 2d 842; 277 U. S. 438 16
People v. Caparelli, 21 App. Div. 2d 882..... 20
People v. Hannon, 50 Misc. 2d 297, 270 N. Y. S. 2d 327 .....10, 14, 15
People v. Smith, 25 Ill. 2d 219, 184 N. E. 2d 841..... 10
Rogers v. United States, 340 U. S. 367..... 9
Sparf and Hansen v. United States, 156 U. S. 51..... 10
States v. Adams, 181 Neb. 75, 147 N. W. 2d 144..... 16
United States v. Berman, 24 F. R. D. 26.....10, 16
United States v. Echeles, 352 F. 2d 892.....15, 16
United States v. Gleason, 259 F. Supp. 282..... 15
United States v. Kahn, 366 F. 2d 259, cert. denied, 385 U. S. 948..... 15
United States v. Seeger, 180 F. Supp. 467.....9, 15
United States v. Valdes, 262 F. Supp. 474..... 15
United States ex rel. Hill v. Deegan, 268 F. Supp. 580 19
Washington v. Texas, 388 U. S. 14.....8, 10, 11, 16, 18

Statutes and Rules.

18 U. S. C. § 371..... 3, 6
18 U. S. C. §§ 656, 657, 1006.....3, 4, 6
28 U. S. C. § 1254..... 2
Rule 14, Federal Rules of Criminal Procedure.....2, 20
Code of Ala., tit. 15, § 319..... 17
Ga. Code Ann., § 27-2101..... 17
Iowa Code Ann., tit. 36, § 780.1..... 17
Kansas Stats. Ann., § 62-1429..... 17
Minn. Stats. Ann., § 631.03..... 17

Miss. Code Ann., § 2514 17
Mo. Ann. Stats., § 545.880 17
Okla. Stats. Ann., tit. 22, §838 17
Ore. Rev. Stats., tit. 14, § 136.060 17
Verm. Stats. Ann., tit. 13, § 6507 17
Code of Virg., § 19.1-202 17
Wyo. Stats. § 7-230 17

Miscellaneous.

"Joinder of Defendants in Criminal Prosecutions," 42 N. Y. U. L. Rev. 513 ..... 14, 20
Note, 31 Chi. L. Rev. 556 10
Orfield, "Relief from Prejudicial Joinder in Federal Criminal Cases", 36 Notre Dame, Law 276, 496 8
8 Wigmore, Evidence, 439 (McNaughten Rev., 1961) .. 10

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

ARTHUR B. SACHS AND M. PRIAL CURRAN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

INTRODUCTORY STATEMENT.

This case presents an important and recurring issue of criminal procedure that currently divides federal (and state) courts: Does the Sixth Amendment—or the Federal Rules of Criminal Procedure—require the granting of a defendant's timely motion to be tried separately from a co-defendant whose testimony is vitally needed, but who would invoke his Fifth Amendment privilege and refuse to take the witness stand at a joint trial? The present judicial conflict and confusion over this issue is understandable, for what it involves is no less than a clash between the Sixth Amendment's right to summon witnesses and the Fifth Amendment's privilege against self-incrimi-

nation. Some courts have "preferred" the Fifth Amendment and some the Sixth.

Petitioners are asking this Court to recognize a rule that requires no sacrifice of, or preference for, either Amendment: a rule—already specifically accepted by the Fifth Circuit but rejected in this case by the Seventh Circuit—that avoids unnecessary conflict between these two important constitutional rights by reducing (and only slightly) the convenience afforded by joint trials in a limited category of cases.

OPINION BELOW.

The opinion of the Seventh Circuit is not yet reported but is reproduced in the separate Appendix to the petition.

JURISDICTION.

The decision of the Seventh Circuit was rendered on June 29, 1967. A timely petition for rehearing or rehearing *en banc* was denied on September 12, 1967.

Jurisdiction to review the judgment below is conferred by 28 U. S. C. § 1254.

QUESTION PRESENTED.

Whether the Sixth Amendment right of compulsory process—or alternatively, Rule 14 of the Federal Rules of Criminal Procedure—requires that a separate trial be granted to a defendant who will testify, and urgently needs to call to the witness stand a co-defendant who has unique first-hand knowledge of all the facts but would refuse to take the stand at a joint trial.

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED.

U. S. CONSTITUTION, AMENDMENT VI:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor. . . ."

U. S. CONSTITUTION, AMENDMENT V:

"No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

RULE 14, FEDERAL RULES of CRIMINAL PROCEDURE:

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election for separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. . . ."

STATEMENT OF THE CASE.

(a) The Parties and the Indictment.

The petitioner Arthur B. Sachs is an attorney engaged in the general practice of law in Chicago; petitioner M. Prial Curran is also an attorney and is employed as an associate in Sachs' law office. Both Sachs and Curran have practiced law in Chicago for over 25 years.

Sachs and Curran were indicted together with an ex-client, S. Lawrence Kahn (who is not a party to this petition), for alleged violations of the banking laws (18 U. S. C. §§ 656, 657, 1006) and conspiracy to commit such violations (18 U. S. C. § 371). Kahn was a real estate developer and builder from Indiana; Kahn also owned a number of companies engaged in investment and financ-

ing activities in Indiana. In 1962 Kahn acquired controlling interest of the Chatham Bank of Chicago. Sachs, who had no prior connection or acquaintance with Kahn, was retained as attorney for the bank. Thereafter, Kahn also acquired, through his various companies and nominees, the Leyden and Equitable Savings and Loan Associations in Chicago; Sachs also became counsel for these institutions.

Although the original indictment contained 18 counts, several were dismissed prior to or after trial for various reasons. Of the remaining counts Sachs was named and convicted on ten, Curran on four and Kahn on six. Sachs and Kahn were sentenced to five years on each count, the sentences to run concurrently; Curran received concurrent sentences of two years on each count.[1]

(b) Kahn's Position and Role in the Transactions on Trial.

All of the counts in the indictment that were tried involved loans made by the Chatham Bank and the two Savings and Loan Associations acquired by Kahn; the loans were made either to companies owned by Kahn or to a person acting as Kahn's nominee. The proceeds of the loans were used to acquire the Savings and Loan Associations for Kahn and to repay prior loans. The indictment alleged that the loans were made without adequate security and were thus prohibited by Sections 656, 657 and 1006, 18 U. S. C. The government has conceded below that *neither Sachs nor Curran* ever personally received any of the proceeds of the questioned loans (Trial Transcript pp. 1991-2040, 3739).

---

1. After the trial and while the convictions were being appealed, the government filed motions to disbar Sachs and Curran from the practice of law in the District Court. These motions have been held in abeyance pending final disposition of the appeal.

Kahn was accordingly the central and principal figure in all of the transactions on trial. Kahn, his employees—and particularly his secretary, Mary Burleson—were present at, or supervised, all of the transactions and they prepared and executed the necessary documents to evidence security, appraisals, title and the like. Neither Sachs nor Curran was present at many (if not most) of the occurrences involved.

(c) The Nighttime Withdrawal of $991,900 in Checks From Leyden Savings and Loan Association by Kahn and His Secretary.

The single most important and dramatic episode disclosed at the trial was the clandestine withdrawal of $991,900 from Leyden Savings and Loan Association on the night of January 23, 1963. The withdrawal was accomplished by the writing of two checks for $616,900 and $375,000. Kahn, his secretary (Mary Burleson) and an officer of Leyden went to the Association after it was closed and drew the checks; both were made payable to companies owned by Kahn (but not represented by Sachs and Curran). *Neither Sachs nor Curran was present or had any knowledge of this occurrence until afterward.* (Trial Transcript pp. 802-805, 1997-99, 2641.) And, as we previously noted, Sachs and Curran did not receive any of the proceeds of these withdrawals or any of the other loans in question.

The substantive counts involving the surreptitious nighttime check-writing at Leyden (Counts 8, 9, 10 and 11) named Kahn and Sachs as defendants. These four counts were *dismissed as to Kahn* prior to trial; the trial judge sustained Kahn's contention that the counts did not sufficiently allege that he was an "officer, agent, employee or connected in any capacity with" Leyden, as required by

§§ 657 and 1006, 18 U. S. C. Accordingly, *Sachs alone* stood trial upon these counts; the court held that Sachs as attorney for Leyden had the requisite "connection with" the Association. The conspiracy count also alleged the drawing of these two Leyden checks as an overt act in furtherance of the alleged conspiracy.

(d) The Motions of Sachs and Curran for a Severance From Kahn.

Prior to trial, Sachs and Curran twice made a motion to be tried separately from the defendant Kahn. The specific grounds for the motions were:

(a) Sachs and Curran intended to waive the Fifth Amendment and testify at the trial but were advised that Kahn would *not* do so;

(b) Sachs and Curran urgently needed the testimony of Kahn to establish their defense of innocence to all the counts—and particularly those concerning Kahn's nighttime withdrawal of the two checks from Leyden Savings and Loan Association when neither Sachs nor Curran was present;

(c) If tried jointly with Kahn, Sachs and Curran would be denied the right to place Kahn upon the witness stand and examine him; and

(d) If tried jointly with Kahn, Sachs and Curran would be deprived of their right to comment to the jury on Kahn's refusal to testify.

The trial judge summarily denied the motions for severance and ordered a joint trial.[2]

---

2. On the second morning of trial and before the opening statements were complete, the fourth co-defendant—Thomas Joyce—pleaded guilty to aiding and abetting Sachs and Kahn in the offense alleged in Count 4. The other substantive count against Joyce (Count 3) was then dismissed by the government, and Joyce was granted a

(Continued on next page)

At the trial both Sachs and Curran waived the Fifth Amendment and testified; both men were subjected to intensive cross-examination. (The trial judge later commented to the jury that the case "bristles with issues of veracity" and that in instances "too numerous to specify" the government's testimony was "flatly contradicted by the testimony of the defendants." App. 13.) Kahn for his part did not take the stand; Sachs and Curran thereupon filed still another motion for a severance from Kahn, which the trial judge denied. The trial judge then specifically prohibited counsel for Sachs and Curran from making any comment to the jury in the closing arguments concerning Kahn's failure to take the stand.[3]

---

severance from the conspiracy count. Petitioners immediately moved for a mistrial because Joyce's plea of guilty to aiding and abetting would compellingly imply the guilt of the alleged principals, and because a new trial could be started with a minimum of inconvenience to the government. The trial court denied the motion and promptly informed the jury of Joyce's guilty plea. (See p. 22, *infra*.)

3. The trial judge in instructing the jury also made no comment concerning Kahn's failure to testify. In marked contrast, however, the trial judge gave a most protracted and unusually repetitious instruction warning against the credibility of any witnesses having a direct or personal interest in the outcome of the case. (This instruction is reproduced in the footnote in the Seventh Circuit's Opinion, commencing at p. 12 of the Appendix hereto and ending at p. 17.) For example, the instruction cautioned that, "Where a witness has a strong personal interest in the outcome of a trial, the temptation may be strong to color, pervert or withhold the facts, or even though completely honest, a witness who has an interest in the case may unconsciously shade his testimony." (App. 16).

The defendants Sachs and Curran were the only witnesses having a direct and personal interest in the outcome. The trial judge admittedly gave the extended credibility instruction *sua sponte* and as a result of certain F. B. I. interview reports that the judge examined *in camera* at the trial; petitioners to this day have never had an opportunity to examine these documents. (See pp. 21-22, *infra*.)

REASONS FOR GRANTING THE WRIT.

The Court Should Grant the Petition to Resolve an Important Conflict Among Circuits (and State Courts) as to Whether a Severance Should Be Granted to Enable a Defendant, Who Intends to Testify, to Call to the Stand a Co-Defendant Having Peculiar Knowledge of the Matters on Trial But Who Would Refuse to Testify At a Joint Trial.

Motions for severance in the past have often been prompted by a desire to *exclude* evidence (such as a confession) because its admission against one defendant at a joint trial might prejudice another defendant. [See *Delli Paoli* v. *United States*, 352 U. S. 232 (1957); Orfield, "Relief from Prejudicial Joinder in Federal Criminal Cases," 36 Notre Dame Law, 276, 495 (1961).] This case presents another critical aspect of the severance problem, petitioners here moved for a severance in order to *introduce*, rather than exclude, relevant evidence, *i.e.*, the testimony of a co-defendant having detailed and first-hand knowlegde of the facts, but who would refuse to take the stand at a joint trial. The issue thus presented involves a serious and recurring clash between the Sixth Amendment right to call witnesses—recently given new dimension in *Washington* v. *Texas*, 388 U. S. 14 (1967)—and the Fifth Amendment privilege against self-incrimination [see *Griffin* v. *California*, 380 U. S. 609 (1965).]

At a separate trial the petitioners Sachs and Curran would unquestionably have been able to exercise their Sixth Amendment right to call Kahn to the witness stand. Kahn had peculiar and intimate knowledge concerning all the transactions charged in the indictment, and his testimony was vitally needed to establish Sachs' and Curran's defense of no knowledge of or participation in the alleged

offenses. See *United States* v. *Seeger*, 180 F. Supp. 467 (S. D. N. Y. 1960). Kahn might well have been willing to testify fully at a separate trial.[4] Even if he would not, Kahn could have been compelled by the trial judge to testify on all *non*-incriminating subjects.[5] Moreover, even if Kahn were permitted to plead the Fifth Amendment to all questions, petitioners would still have had the valuable opportunity—specifically denied them by the trial judge below—to comment to the jury upon Kahn's unwilling-

4. There are many cogent reasons why a defendant would not want to testify at his own trial, but would be entirely willing to testify at a separate trial where his own guilt or innocence was not at issue. The difference in position is implicitly recognized by the rule that a defendant has an absolute right not to take the stand at his own trial, but has only a limited right not to answer particular incriminating questions at someone else's trial. See *Hoffman* v. *United States*, 341 U. S. 479 (1951). Conversely, once a defendant takes the stand at his own trial—for whatever purpose—he exposes himself to questioning about his own involvment in the crime charged against him. *E.g.*, *Caminetti* v. *United States*, 242 U. S. 470 (1917). This double-edged rule has the effect of excluding much relevant evidence at a joint trial that would be available at separate trials.

5. *Hoffman* v. *United States*, 341 U. S. 479 (1951); *Rogers* v. *United States*, 340 U. S. 367 (1951). Thus, at a separate trial Kahn could not arbitrarily refuse to answer any and all questions (as he could at a joint trial) but would have to show the court the probable incriminating tendency of particular questions. In this regard the necessity of putting Kahn on the stand was especially important to the petitioners, since Kahn was dismissed from Counts 8, 9, 10 and 11 involving the dramatic nighttime withdrawal of $991,900 in checks from Leyden Savings and Loan Association when the petitioners were concededly not present and claimed unawareness of the episode (see Statement of the Case, *supra*, pp. 5-6). The result of the government's insistence on a joint trial was to exclude absolutely from the jury's consideration any and all testimony by Kahn as to this critically important transaction (and, of course, all other transactions on trial).

ness to testify (in contrast to the petitioners' willingness to testify).[6] Plainly, by denying separate trials, the trial court and the Seventh Circuit abrogated Sachs' and Curran's Sixth Amendment rights in favor of Kahn's Fifth Amendment rights.[7] And it did so although no choice of either right was necessary, since the less serious alternative of severance was readily available.

The result below is in plain effect indistinguishable from the denial of Sixth Amendment rights condemned in *Washington* v. *Texas*, 388 U. S. 14 (1967). In that case a statute disqualified "participants" in the same alleged crime from being called as witnesses for co-participants, "although

---

6. The force of inferences from a refusal to testify has often been acknowledged by the courts. When a defendant takes the stand but then refuses to answer certain questions, the prosecution may comment to the jury on his refusal. *Caminetti* v. *United States*, 242 U. S. 470, 492-95 (1917). When he fails to answer accusations of crime, his failure has long been acknowledged to be probative. *Sparf and Hansen* v. *United States*, 156 U. S. 51, 56 (1895); *People* v. *Smith*, 25 Ill. 2d 219, 184 N. E. 2d 841 (1962); Note, 31 Chi. L. Rev. 556, 557 n. 13 (1964). And his refusal to testify about incriminating matters has been held to be weighty evidence in civil cases. *Hansel* v. *Purnell*, 1 F. 2d 266 (6 Cir. 1924), cert. denied, 266 U. S. 617; *Duratron Corp.* v. *Republic Stuyvesant Corp.*, 1 Crim. L. Rptr. 2209 (N. J. App. Div. 1967); 8 Wigmore, *Evidence*, 439 & n. 14 (McNaughten rev. 1961). It is not surprising, therefore, that several courts have concluded that a defendant has an absolute, constitutional right to comment on his co-defendants' failure to testify. *de Luna* v. *United States*, 308 F. 2d 140 (5th Cir. 1962) (Wisdom, J.); *People* v. *Hannon*, 50 Misc. 2d 297, 270 N. Y. S. 2d 327 (Spec. Term 1962). See *Hayes* v. *United States*, 329 F. 2d 209 (8 Cir.), cert. denied, 377 U. S. 980 (1964); *United States* v. *Berman*, 24 F. R. D. 26 (S. D. N. Y. 1959).

7. Kahn in fact was accorded *both* his Fifth *and* Sixth Amendment rights at the joint trial, since he suffered no comment to the jury concerning his failure to testify and had full opportunity to examine Sachs and Curran when they voluntarily assumed the witness stand.

there was no bar to their testifying for the state." This Court, in holding the statute unconstitutional, declared:

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. . . . This right is a fundamental element of due process of law." (388 U. S. at 19.)

Here, as there, petitioners were prevented from presenting evidence of a co-defendant that "would have been relevant and material" and "was vital to the defense." (388 U. S. at 16.) Here, as there, the co-defendant "knew exactly who" had participated in the relevant transactions. (*Ibid.*) And here, as there, the government could have arranged to call the co-participant to the witness stand if it wished by simply making the unreviewable decision to hold separate trials. The petitioners, however, had no such alternative. Indeed, the parallels between *Washington* and this case are so striking[8] that if the decision below is permitted to stand, the very result condemned in *Washington* can still be accomplished by the simple device of joining alleged co-participants together at one trial; the important principle announced in the *Washington* case could thus be easily circumvented.

The Fifth *vs.* Sixth Amendment dilemma presented in this case is a quandary that is arising in criminal trials with all too-increasing frequency; lower courts throughout the country are reaching divergent results, and now as a

8. To be sure, in *Washington* there was some indication in the record that the co-participant would have willingly testified for Washington; while here there is no specific indication in the record. But the willingness of the witness to testify cannot be deemed relevant under the Sixth Amendment's "compulsory process" language, which clearly contemplates a right to subpoena unwilling as well as willing witnesses.

result of the decision below there exists a flat conflict between Circuits.

A. The Petition Should Be Granted to Resolve the Conflict Between the Fifth and Seventh Circuits.

The decision below in this case is in direct conflict with the decision of the Fifth Circuit in *de Luna* v. *United States*, 308 F. 2d 140 (5th Cir. 1962), rehearing denied, 324 F. 2d 375 (1963). In both cases the courts formulated rules covering the identical situation: where co-defendants have "inconsistent" defenses (App. 28); where one defendant intends to testify while another intends to invoke the Fifth Amendment and remain silent; and where "an attorney's duty to his client should require him to draw the jury's attention to the possible inference of guilt from a co-defendant's silence" (308 F. 2d at 141). The rules announced by the two circuits are, however, diametrically opposed. The *de Luna* Court announced the following prophylactic rule for the Fifth Circuit:

> "In a criminal trial in a federal court an accused has a constitutionally guaranteed right of silence free from prejudicial comments, even when they come only from a co-defendant's attorney. If an attorney's duty to his client should require him to draw the jury's attention to the possible inference of guilt from a co-defendant's silence, *the trial judge's duty is to order that the defendants be tried separately.*" (308 F. 2d at 141; emphasis added.)

The Seventh Circuit—calling this rule "dicta"—rejected the Fifth Circuit's basic right to severance in the following terms:

> "The procedural difficulties and the complication of joint trials arising from the rule suggested by dicta in *de Luna* are so great that we cannot say there is an absolute right, without reference to the circumstances of defense at trial, for a defendant to comment on the

> refusal of a co-defendant to testify. We think there must be more to justify the disintegration of a trial, such as a conspiracy trial, in which there is a cohesion of crime alleged, defendants charged, and proof adduced. *There must be a showing that real prejudice will result from the defendant's inability to comment.*"[9] (App. 27; emphasis added.)

The Fifth Circuit's rule has not been read as "dicta" by the District Courts in that Circuit;[10] those courts are regularly following the declared rule of *de Luna*. The United States Attorney himself so announced to the Fifth Circuit in unsuccessfully urging rehearing of the *de Luna* case:

---

9. The Seventh Circuit thus adopted the view of the dissenting judge in the *de Luna* case, 324 F. 2d at 376.

10. The only distinction between *de Luna* and this case —and a distinction that is entirely irrelevant for purposes of determining whether there is a conflict—simply reflects the procedural postures in which the cases came before the Courts of Appeals. In *de Luna*, the trial judge had *permitted* the co-defendant's attorney to comment on de Luna's failure to take the stand; here the trial judge had *forbidden* such comment. Thus in *de Luna*, the court was asked to decide whether the non-testifying defendant's rights had been violated; here the testifying defendants' rights were at stake. There can be no doubt that if *de Luna* had arisen in the same procedural posture as this case—if the trial judge in *de Luna* had forbidden comment as did the trial judge here—the *de Luna* Court would have reversed his co-defendant's conviction. Indeed, the *de Luna* Court makes that crystal clear:

> "And considering the case from Gomez's point of view his attorneys should be free to draw all rational inferences from the failure of a co-defendant to testify, just as an attorney is free to comment on the effect of any interested party's failure to produce material evidence in his possession or to call witnesses who have knowledge of pertinent facts. Gomez has rights as well as de Luna, and they should be no less than if he were prosecuted singly. His right to confrontation allows him to invoke every inference from de Luna's absence from the stand." (308 F. 2d at 143.)

> "[The case has] already had a significant effect on joint trials in the Western District of Texas in that joint trials have been and are now automatically severed and not permitted within the San Antonio, Austin and Waco Division." Petition for Rehearing, p. 21, *de Luna* v. *United States*, 308 F. 2d 140 (5th Cir. 1962).

The present situation, therefore, is one of vexing and unresolved conflict: in the Fifth Circuit, defendants in petitioners' plight would have been granted a severance; while in the Seventh Circuit, "severance should not be granted except for the most cogent reasons." (App. 23.)

B. The Writ Should Be Granted Because the Severance Question Has Also Engendered Conflict and Confusion Among Other Circuit, District and State Courts.

In addition to the sharp conflict between important Circuits over a critical rule of constitutional-criminal procedure, there is widespread disagreement and confusion among other Circuits, federal district courts and state courts at every level over the standards to be applied in deciding motions for severance. [For a most recent survey and documentation of this conflict, see *Joinder of Defendants in Criminal Prosecutions*, 42 N. Y. U. L. Rev. 513, esp. at 519-20, 525-27 (May, 1967).]

For example, in *People* v. *Hannon*, 50 Misc. 2d 297, 270 N. Y. S. 2d 327 (Sup. Ct. Spec. Term, 1966) the court held—on facts virtually identical to those here—that a severance was required. In *Hannon* three defendants were jointly indicted for conspiracy and perjury. Exactly as in this case, two defendants moved before trial for a severance from the third defendant. The moving papers stated that the two defendants intended to testify in their own behalf; that they desired to call the co-defendant to the stand; and that they wished to comment to the jury upon the co-defendant's silence in the event of his refusal

to testify. In holding that the defendants were entitled to a severance, the court—after a careful review of the authorities—specifically followed the rule announced in the *de Luna* case (but which the Seventh Circuit has rejected in this case). The *Hannon* court declared:

> "In short, as was pointed out in *De Luna* v. *United States* (308 F. 2d 140, 154, 155) (and followed in *United States* v. *Echeles,* 352 F. 2d 892, 897), in order for the defendants to see the face of justice, there must be a separation of the trials.
>
> "My perception of and judicial sense of duty to follow the course that should be taken here are derived from a persuasion that the authorities, *both State and Federal,* point out—if indeed they do not mandate—the direction that a sound exercise of judicial 'discretion' should take in disposing of these motions under the statute (Code Crim. Pro., § 391), for *I am frank to say that I would feel constrained to grant a separation of trials (as herein indicated) on constitutional grounds,* even if no statutory authority for such action existed." (50 Misc. 2d at 302; emphasis added.)

Compare *People* v. *Massie,* 59 Cal. Rptr. 733, 428 P. 2d 869, 879-86, esp. p. 886 n. 31 (Tobriner, *J.*).

Lower courts (both federal and state) are also in disagreement as to whether, and to what extent, a defendant must show that his co-defendant will testify only at a separate trial and that the testimony will be helpful. Some courts have granted severance without any such showing. *E. g., United States* v. *Valdes,* 262 F. Supp. 474 (D. Puerto Rico, 1967); *People* v. *Hannon, supra.* And see *United States* v. *Gleason,* 259 F. Supp. 282 (S. D. N. Y. 1966); *United States* v. *Seeger,* 180 F. Supp. 467 (S. D. N. Y. 1960). Other courts have required proof that a co-defendant is more likely to testify at a separate trial, *United States* v. *Kahn,* 366 F. 2d 259 (2 Cir. 1966) cert. denied, 385 U. S. 948; *Kolod* v. *United States,* 371 F. 2d 983 (10 Cir. 1967), cert. petition filed 5/5/67 (No. 1360), and/or that his

testimony would exonerate the defendant who called him, *State* v. *Adams,* 181 Neb. 75, 147 N. W. 2d 144 (1966); see *Olmstead* v. *United States,* 19 F. 2d 842 (9 Cir. 1927), aff'd on other grounds, 277 U. S. 438 (1928). See also *United States* v. *Berman,* 24 F. R. D. 26 (S. D. N. Y. 1959); *People* v. *Massie, supra,* p. 15.

In the present case, the Seventh Circuit adopted the most stringent of all tests; it conceded that Sachs' and Curran's defense "was inconsistent with that of Kahn," but denied them a severance (and the right to comment on Kahn's failure to testify) because (a) the defenses were not "mutually exclusive," and (b) petitioners had not submitted proof that Kahn would testify in their behalf at a separate trial.[11]

These two requirements, however, are themselves mutually exclusive and contradictory, when judged from any realistic or practical standpoint. It would be the extremely rare—if not unheard of—case where co-defendants throw the *whole blame* on each other, and yet one obliges the other with a pre-trial statement *absolving* the other from blame. The more usual and likely case, and the one where the need for Sixth Amendment "compulsory process" is greatest, is when (as in the instant case) a

11. The Seventh Circuit distinguished its prior case of *United States* v. *Echeles,* 352 F. 2d 892 (1965), on the ground that Echeles' co-defendant had made oral statements before trial tending to exonerate Echeles. The government urged in that case that the co-defendant still might refuse to testify at a separate trial, despite his earlier statements. The Seventh Circuit rejected that argument as "speculation"; it held that Echeles "should not be foreclosed of the *possibility* that [the co-defendant] would testify in his behalf *merely because that eventuality was not a certainty.*" (353 F. 2d at 898; emphasis added.) In *Echeles* the Seventh Circuit also cited with strong approval the *de Luna* holding that the right to comment on a co-defendant's refusal to testify must be protected. Clearly, the Seventh Circuit in this case has abandoned both of these grounds of the *Echeles* severance holding.

testifying defendant desires to call a co-defendant who will not take the stand at a joint trial, the defenses are inconsistent, and there is no *guarantee* that the co-defendant will give exculpatory testimony at a separate trial. If the co-defendant *fails* to give exculpatory testimony, the government is not harmed (and indeed, may be substantially helped), and in any event, the Sixth Amendment right of compulsory process will have been fully protected. Our research has disclosed no case (other than the decision below) construing the Sixth Amendment to apply only where there are mutually exclusive defenses and where there is a showing that the desired witness will willingly give testimony that tends to absolve the defendant.

C. The Court Should Determine Whether the Denial of Sixth Amendment Rights Is Outweighed by a General Allegation of "Inconvenience."

Although it is clear that the petitioners could have exercised their Sixth Amendment right to summon Kahn to the stand at a separate trial, the government asserted below—as it usually does in such cases—that separate trials would have been inconvenient.[12] The Seventh Circuit uncritically accepted this general assertion and justified the denial of

12. It is noteworthy that at least twelve states are unimpressed by this alleged inconvenience; they give all defendants, or all felony defendants, separate trials as a matter of right. [Code of Ala., tit. 15, § 319; Ga. Code Ann. § 27-2101; Iowa Code Ann., tit. 36, § 780.1; Kansas Stats. Ann. § 62-1429; Minn. Stats. Ann. § 631.03; Miss. Code Ann. § 2514; Mo. Ann. Stats. § 545.880 (except for some rape and sodomy trials); Okla. Stats. Ann., tit. 22, § 838; Ore. Rev. Stats. tit, 14, § 136.060; Verm. Stats. Ann., titl. 13, § 6507 (but only if 5 year sentence possible); Code of Virg. § 19.1-202; Wyo. Stats. § 7-230.]

There is no evidence that prosecutors and criminal courts in these states are more burdened than in other states with docket congestion or other inconvenience as a result of the right to severance.

severance upon the ground of "*possible* prejudice to the Government which *might* result from a separate trial." (App. 23; emphasis added.) This stock argument (rarely accompanied by any particulars) has become a platitude that should now be rejected by this Court. The Sixth Amendment does not provide that a defendant has the right to summon witnesses only when it will be convenient to the prosecutor; it provides that the defendant "*shall* enjoy the right" in "*all* criminal prosecutions." (Emphasis added.) See *Washington* v. *Texas*, 388 U. S. 14 (1967); *In re Oliver*, 333 U. S. 257 (1948); *Greenwell* v. *United States*, 317 F. 2d 108 (D. C. Cir. 1963).

In balancing away the petitioners' Sixth Amendment rights in favor of alleged convenience to the government, the Seventh Circuit stated that petitioners had failed to make a showing of "real prejudice" from the denial of severance. We submit that Sachs and Curran were palpably prejudiced by being tried with Kahn in light of the facts that:

First, Kahn was the key figure in all the transactions on trial and had peculiar knowledge that was critical to petitioners' defense of innocence (particularly concerning the four counts that involved the nighttime check-writing for $991,900 when neither Sachs nor Curran was present but Kahn was);

Second, the petitioners both took the stand and fully testified as to their lack of knowledge and participation in all the offenses alleged;

Third, the trial judge himself acknowledged (in instructing the jury) that the case "bristles with issues of veracity" (App. 13), and the outcome of the case vitally hinged on credibility; and

Fourth, Kahn was the only witness having personal knowledge of the facts who was not called to the witness stand.

On this record it is unjust and illogical to simply label the denial of Sachs' and Curran's Sixth Amendment rights as "non-prejudicial" or "harmless error". Moreover, as this Court held last term in *Chapman* v. *California*, 386 U. S. 18 (1967), the burden of proving that a constitutional deprivation is *not* prejudicial is upon the *prosecution*, and the lack of prejudice must be proved *"beyond a reasonable doubt."* (386 U. S. at 24; emphasis added). Here the Seventh Circuit has held exactly the opposite by requiring the defendants to demonstrate prejudice, in order to outweigh an unsupported general assertion of inconvenience to the government.

Assuming, *arguendo*, that inconvenience to the prosecution can properly be weighed against defendants' constitutional rights, we submit the prosecution should be required to do more than simply voice the plaint of general inconvenience as it did below. Here, as Judge Marvin Frankel observed in a recent scholarly opinion holding that a severance was required in *United States ex rel. Hill* v. *Deegan*, 268 F. Supp. 580, 595 (S. D. N. Y. 1967), the prosecution "submitted nothing to the trial court—and, forsooth, argues nothing here—that suggests *special reasons* for opposing severance when the reasons for allowing it were so obvious and obviously substantial." (Emphasis added.)

The instant case clearly provides this Court with the opportunity to articulate a rule, such as that adopted by Judge Frankel, requiring the government to show "special reasons" (other than general allegations of inconvenience) for denying severance where it appears that a joint trial will result in the sacrifice of a defendant's constitutional rights.

Unless this Court requires the government to allege more than general inconvenience, the decision whether to try co-defendants jointly or separately will, in practice, be

delegated to the prosecutor, who makes the initial decision whether to try defendants separately or jointly. And there is no reason to believe that the prosecutor's decision is made in a judicial manner by carefully balancing convenience to the government against prejudice to the defendants. Indeed, there is some disturbing evidence that prosecutors consider the possibility that a defendant will testify for a co-defendant at a separate trial as an argument *in favor* of a joint trial. See *People* v. *Caparelli*, 21 App. Div. 2d 882 (1964).

D. Special and Compelling Circumstances Favor a Grant of the Writ.

In addition to the Circuit and lower court conflict over the severance issue (and the clash between Fifth and Sixth Amendment rights), there are important factors present that enhance the worthiness of the case for plenary review. The case presents the Court with a particularly good record for consideration of the severance question; the point was adequately asserted by petitioners at every stage below. Since this case is a federal one, the question can be considered and decided under the Constitution or the Federal Rules of Criminal Procedure.[13]

---

13. Even if the Court declines to decide that the Sixth Amendment requires severance in the circumstances of this case, it should decide—under its supervisory power over the federal judiciary—that the language of Rule 14, F. R. Cr. P., requires severance. In the federal courts joinder and severance are now governed not by legislation but by the rules promulgated and construed by this Court. In light of the now-prevailing confusion and conflict, this Court should delineate uniform standards for the federal courts to apply in deciding motions for severance. "In order to implement the purpose of Rule 14, guidelines must be developed by which the trial court can exercise its discretion, and by which the Appellate Courts may review that exercise." *Joinder of Defendants in Criminal Prosecutions*, 42 N. Y. U. L. Rev. 513, 520 (May 1967).

Moreover, there are special and aggravating factors present in this case that clearly highlight the importance and necessity of resolving the severance problem in order to prevent injustices:

First: Sachs and Curran both waived the Fifth Amendment and testified at the trial. Kahn refused to do so and suffered no comment to the jury either by counsel for the other parties or the trial judge. By being jointly tried with Kahn, Sachs and Curran not only lost their rights under the Sixth Amendment to call Kahn to the witness stand and to comment to the jury if he refused to testify, but they were also burdened with a lengthy and repetitious instruction disparaging their credibility.[14] (This highly unusual instruction is set forth in full in the Seventh Circuit's opinion. App. 12-17.) The trial judge admittedly gave this instruction as a result of hearsay F. B. I. reports of confidential interviews of Sachs and Curran prior to the indictment; the government had stipulated in writing that it would not introduce these F. B. I. reports at the trial, but then attempted to get them before the jury no less than five separate times.

The government handed the F. B. I. reports to the trial judge who retained and examined them *in camera* during Sachs' and Curran's testimony. After the trial, the judge stated that he believed the F. B. I. reports were "inconsistent" with Sachs' and Curran's testimony and he therefore had given the extended and *sua sponte* credibility instruction warning against the testimony of witnesses having a personal interest in the outcome. When counsel for Sachs and Curran then again requested to inspect the F. B. I. reports, the trial judge refused and ordered the F. B. I. reports to be sent up to the Court of Appeals in a sealed rec-

14. See Statement of the Case, *supra*, note 3, p. 7.

ord.[15] (To this day we have never had the opportunity to examine, explain or rebut the *ex parte* F. B. I. reports.) Clearly, the extended credibility instruction placed an additional onus upon Sachs and Curran that was not suffered by the non-testifying co-defendant, Kahn, at the joint trial.

Second: Sachs and Curran had also moved before trial for a severance from the fourth defendant, Thomas Joyce; this too was denied. On the second morning of trial and before any evidence had been presented, Joyce claimed illness and said he wished to enter a plea pursuant to an understanding with the government. The trial judge allowed Joyce to plead guilty to aiding and abetting Sachs and Kahn in the commission of the offense alleged in Count 4; Sachs and Kahn were charged as principals in Count 4. Joyce was granted a severance from the conspiracy count; the other substantive count against him was dismissed.[16] Petitioners then moved for a mistrial—in effect a severance, since it would result in a new trial separate from Joyce and without the adverse effects of his guilty plea. The trial judge denied the motion; he then informed the jury of Joyce's plea of guilty to aiding and abetting Sachs and Kahn and requested the jury to "disregard" that plea as to the other defendants. However, in the

---

15. The pertinent colloquy between the trial judge and counsel for Sachs and Curran was:

"The Court: No, I don't think that you will have any opportunity to see them in camera, no.

"Mr. Kirby: Well, how can I vest myself—

"The Court: The Court of Appeals may take a look at them, but you are not going to take a look at them." (Appendix for Sachs and Curran in Court of Appeals, p. 389.)

16. See Statement of the Case, *supra*, note 2, pp. 6-7. Joyce subsequently received a suspended sentence on Count 4 and was never tried on the conspiracy count.

final instructions to the jury, the trial judge in defining the crime of aiding and abetting declared that the principals must be found guilty if the aider and abetter is guilty.

Although we do not assert that the F. B. I.-prompted credibility instruction and the guilty plea of Joyce would, standing alone, constitute grounds for seeking certiorari, we do contend that these occurrences keenly and graphically demonstrate the vices that can and do flow from denying a severance in a case such as this one.

CONCLUSION.

For the foregoing reasons, we submit that the petition should be granted.

Respectfully submitted,

DON H. REUBEN,
LAWRENCE GUNNELS,
KIRKLAND, ELLIS, HODSON,
CHAFFETZ & MASTERS,
2900 Prudential Plaza,
Chicago, Illinois,

ALAN M. DERSHOWITZ,
Langdell Hall,
Cambridge, Massachusetts,
Attorneys for Petitioners.

Of Counsel:
WILLIAM T. KIRBY,
HUBACHEK, KELLY, MILLER,
RAUCH & KIRBY,
130 East Randolph Drive,
Chicago, Illinois.

October 10, 1967.